

# NAVIGATING MED-ARB IN CHINA

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## INTRODUCTION

The United States and other foreign parties that have business interests in the People's Republic of China must often decide between commercial arbitration and filing suit in Chinese courts when disputes arise with Chinese parties. If the parties contract to resolve their disputes at a commercial arbitration institution in China<sup>1</sup>, they will have to understand the practice of med-arb. Med-arb is the acronym for mediation-arbitration, a type of dispute resolution that combines mediation (or “conciliation”<sup>2</sup>)

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1. This does not include Hong Kong. *See infra* n.71 and accompanying text (discussing the practice of commercial arbitration in China).

2. A term that is used interchangeably with mediation in China and in this article. Sally A. Harpole, *The Combination of Conciliation with Arbitration in the People's Republic of China*, 24 J. INT'L ARB. 623, 623 (2007).

and arbitration, with the same person serving as arbitrator and mediator. Combining these two distinct dispute resolution processes to form one process is very controversial because, among other things, it compromises the neutrality of the arbitral tribunal, makes uncertain the enforceability of the arbitral award in foreign jurisdictions, and requires arbitrators to also be effective mediators. However, the practice of med-arb is permitted and used in China.

In recent years, “in order to achieve economic development . . . [China] has aggressively established laws, rules and regulations that govern arbitration and litigation.”<sup>3</sup> However, due to continuing perceived links between the judiciary and government, Chinese nationals and non-Chinese, foreign investors often attempt to resolve their disagreements through mediation if at all possible, rather than to subject themselves directly to Chinese courts.<sup>4</sup>

Chinese law and custom encourages the amicable settlement of disputes. This encouragement has roots in the writings of the ancient philosopher, Confucius, who promoted the values of social harmony and the peaceful resolution of conflict.<sup>5</sup> During Communist Party rule, mediation has been used as a way to settle disputes while getting the parties to adopt the Communist Party’s values of conformity.<sup>6</sup> As a result, mediation is widely practiced throughout China, at the grass roots levels of society, in foreign commercial dealings, and unsurprisingly, in arbitration.

The concept of med-arb is not unique to China, and variations of the practice have been used in Western countries, but it is much less accepted and much less common.<sup>7</sup> To effectively arbitrate in China, counsel must understand med-arb’s advantages and its disadvantages with respect to arbitration-only proceedings. Ideally, foreign parties will realize that med-arb in China is very valuable, it is not so different from what they are used to, and that Western practices can learn from Chinese med-arb. This paper contributes to the existing literature by focusing on the experience and perspective of a fully financially independent commercial arbitration institution and one of the top choices when choosing an arbitration forum

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3. Carlos de Vera, *Arbitrating Harmony: ‘Med-Arb’ and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 COLUM. J. ASIAN L. 149, 169 (2004).

4. *Id.* at 152.

5. Gabrielle Kaufmann-Kohler and Fan Kun, *Integrating Mediation into Arbitration: Why It Works in China*, 25 J. INT’L ARB. 479, 480 (2008).

6. *Id.* at 482.

7. See, e.g., Robert L. Ebe, Cooper White & Cooper LLP, *Med/Arb as a Variant on the Usual ADR Process* (July 20, 2012), available at <http://www.cwclaw.com/publications/articleDetail.aspx?id=655>. (illustrating the use of med-arb in the United States).

in Mainland China,<sup>8</sup> the Beijing Arbitration Commission (BAC). In recent years, med-arb has become even more attractive because progressive Chinese local arbitration commissions like the BAC have been consciously improving their practices and moving towards greater independence, impartiality, and competence.

## I. THE MED-ARB PROCESS

Mediation and arbitration are the most common forms of alternative dispute resolution for commercial disputes.<sup>9</sup> Mediation is a voluntary dispute resolution process and the parties in a mediation are not bound to resolve their dispute.<sup>10</sup> Because of their voluntary nature, mediations are essentially negotiations that are facilitated by a mediator.<sup>11</sup> Arbitration, on the other hand, is a dispute resolution process in which a neutral party, the arbitrator or the arbitration panel, hears a dispute between parties and renders a final decision in favor of one of the parties.<sup>12</sup> Med-arb combines these two processes, with the arbitrator also serving as the mediator.

The Arbitration Law of China, which came into effect on September 1, 1995, and the respective Arbitration Rules of Chinese arbitration institutions provide the legal framework for arbitration and med-arb.<sup>13</sup> The arbitration laws increased confidence in the finality and enforceability of arbitration awards in the courts, causing the proliferation of local arbitration commissions (LACs) in China.<sup>14</sup> In his study, Fuyong Chen notes that “any Chinese arbitration institution can arbitrate domestic and international cases regardless of the location of the dispute or [the location of the] parties.”<sup>15</sup> Recently, the top LACs have been dealing with more international commercial arbitrations than ever before because “more foreign companies negotiating with Chinese counterparts are being encouraged to incorporate arbitration clauses in their contracts to settle

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8. Arthur Dong, *Significant Changes Proposed in Beijing Arbitration Commission's ('BAC') New Rules* (2015), available at <http://www.chinalawvision.com/2014/02/articles/china-arbitration-and-arbitrat/significant-changes-proposed-in-beijing-arbitration-commissions-bac-new-rules/>.

9. LEGAL INFORMATION INSTITUTE, *Alternative Dispute Resolution*, [http://www.law.cornell.edu/wex/alternative\\_dispute\\_resolution](http://www.law.cornell.edu/wex/alternative_dispute_resolution) (last visited Apr. 6, 2013).

10. *Id.*

11. *Id.*

12. National Arbitration FORUM, <http://www.adrforum.com/faq.aspx?faq=876> (last visited Apr. 6, 2013).

13. Sally A. Harpole, *The Combination of Conciliation with Arbitration in the People's Republic of China*, 24 J. INT'L ARB. 623, 624 (2007).

14. Fuyong Chen, *Striving for Independence, Competence, and Fairness: A case Study of the Beijing Arbitration Commission*, 18 AM. REV. INT'L ARB. 313, 313-14 (2007).

15. *Id.* at 314.

their disputes before LACs.”<sup>16</sup>

Article 51 of the Arbitration Law of China states that “a written conciliation statement [resulting from mediation] and an arbitration award shall have equal legal effect.” Article 51 also provides arbitrators with a flexible framework for deciding when and how to conduct conciliation during arbitration:

The arbitration tribunal may carry out conciliation prior to giving an arbitration award. The arbitration tribunal shall conduct conciliation if both parties voluntarily seek conciliation. If conciliation is unsuccessful, an arbitration award shall be made promptly. If conciliation leads to a settlement agreement, the arbitration tribunal shall make a written conciliation statement or make an arbitration award in accordance with the result of the settlement agreement.<sup>17</sup>

Article 39 of the Arbitration Rules of the Beijing Arbitration Commission (“BAC”) is similar, but clarifies that conciliation may be conducted at the arbitral tribunal’s discretion, as long as the tribunal obtains consent of both parties:

Conciliation by the Tribunal<sup>18</sup>

(1) The Arbitral Tribunal may, at the request of both parties or upon obtaining the consent of both parties, conciliate the case in a manner it considers appropriate. (2) If the conciliation leads to a settlement, the parties may withdraw their claims and counterclaims if any, or request the Arbitral Tribunal to issue a Statement of Conciliation or make an award in accordance with the terms of the settlement. (3) [The Statement of Conciliation] shall be binding once both parties have acknowledged receipt of it.<sup>19</sup>

The BAC, founded in 1995, is a leading arbitration institution and became fully financially independent from the government early on, in 1998.<sup>20</sup> It

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16. *Id.*

17. Arbitration Law of the People’s Republic of China (adopted at the Ninth Meeting of the Standing Committee of the Eighth National People’s Congress on August 31, 1994, promulgated by Order No.31 of the President of the Peoples Republic of China on August 31, 1994, and effective as of September 1, 1995).

18. In standard arbitration proceedings at the BAC, each party selects one member of the arbitral tribunal, and the Chairman, based on the arbitrator’s background and expertise, selects the lead arbitrator. Summary (or expedited) proceedings are presided by a sole arbitrator selected by the Chairman. Article 18 and 48 of the Arbitration Rules of the BAC.

19. Arbitration Rules revised and adopted at the First Meeting of the Fifth Session of the Beijing Arbitration Commission on September 20, 2007. Effective as of April 1, 2008.

20. GAR, Beijing Arbitration Commission (BAC), <http://globalarbitrationreview.com/regional-arbitration/6/category/88/entry/566/> (last visited

practices independent hiring for staff as well.<sup>21</sup> In terms of caseload,<sup>22</sup> the BAC is comparable to the China International Economic and Trade Arbitration Commission (CIETAC), the most visible arbitration institution, which was established by the China Chamber of International Commerce.<sup>23</sup> The BAC is the main LAC referenced in this article.

In practice, conciliation procedures can commence after arbitration has been initiated, and when the conciliation is unsuccessful, the parties return to the arbitration procedure.<sup>24</sup> The arbitrator may choose the appropriate moment in the course of the proceedings to offer the tribunal's services for settlement purposes.<sup>25</sup> Arbitrators conduct conciliation by caucusing. Russell Thirgood explains that arbitrators conduct mediation in one of the following ways: "the arbitrator consulting with both parties, arbitrators consulting with the parties individually, the parties consulting with each other without the arbitrators present or a combination of these techniques."<sup>26</sup>

A common dispute over share transfer agreements might help illustrate the med-arb process better. A shareholder (respondent)<sup>27</sup> alleged that their share transfer agreements with a company (claimant)<sup>28</sup> were void for misrepresentation. The claimant commenced arbitration proceedings before the BAC, claiming that the agreements were valid. After preliminary procedures, the tribunal heard the claimant's opening statement and the respondent's defense.<sup>29</sup> The tribunal then proceeded to examine the

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Apr. 26, 2015).

21. See Fuyong Chen, *Striving for Independence, Competence, and Fairness: A case Study of the Beijing Arbitration Commission*, 18 AM. REV. INT'L ARB. 313 (2007).

22. The BAC had 1,473 cases in 2012, 1,471 cases in 2011, and 1,566 cases in 2010. *2012 Work Summary of Beijing Arbitration Commission (BAC)*, BEIJING ARBITRATION COMMISSION, [http://arbitrator.bjac.org.cn/en/about\\_us/2012-2013.html](http://arbitrator.bjac.org.cn/en/about_us/2012-2013.html) (last visited May 20, 2015); *Speech in Tea Party of 2012 Spring Festival*, BEIJING ARBITRATION COMMISSION, [http://arbitrator.bjac.org.cn/en/about\\_us/2011-2012.html](http://arbitrator.bjac.org.cn/en/about_us/2011-2012.html) (last visited May 20, 2015); *Speech at the Tea Party of 2011 Spring Festival*, BEIJING ARBITRATION COMMISSION, [http://arbitrator.bjac.org.cn/en/about\\_us/2010-2011.html](http://arbitrator.bjac.org.cn/en/about_us/2010-2011.html) (last visited May 20, 2015). Similarly, the CIETAC had 1,060 cases in 2012, 1,435 cases in 2011, and 1,352 cases in 2010. *Statistics*, CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION, <http://www.cietac.org/index.cms> (last visited April 26, 2015).

23. CIETAC, Introduction, <http://www.cietac.org/index.cms> (last visited Apr. 26, 2015).

24. Sally A. Harpole, *The Combination of Conciliation with Arbitration in the People's Republic of China*, 24 J. INT'L ARB. 623, 625-27 (2007).

25. *Id.*

26. Russell Thirgood, *A Critique of Foreign Arbitration in China*, 17 J. INT'L ARB. 3, 89, 92-93 (2000).

27. Used instead of "Defendant" at the BAC.

28. Used instead of "Plaintiff" at the BAC.

29. Author's own notes on the hearing process at the BAC (on file with the author).

claimant's evidence and respondent's evidence.<sup>30</sup> Typically, the tribunal will make inquiries to the parties after the evidence is presented and decide whether to attempt conciliation.<sup>31</sup> In this case, the tribunal decided to pursue conciliation and both the claimant and respondents consented.<sup>32</sup> First, the tribunal spoke with both parties in a face-to-face caucus. The tribunal proposed that the claimant make a payment of 250 million RMB to the respondents in exchange for the agreement to be performed.<sup>33</sup> Both sides expressed dissatisfaction with the proposal, which meant further back-to-back caucusing, first privately with the claimant, then with the respondent.<sup>34</sup> The respondent no longer wanted to conciliate. After the unsuccessful conciliation, the arbitral tribunal resumed arbitration and gave the parties an opportunity to debate.<sup>35</sup> No additional evidence or a second hearing was required.<sup>36</sup> The tribunal deliberated and issued an arbitral award.<sup>37</sup>

## II. ADVANTAGES AND DISADVANTAGES OF MED-ARB

For those who have arbitration clauses embedded in contracts that designate a LAC as the forum of arbitration and for those who have joint ventures<sup>38</sup> in China, in which case arbitration must be at a Chinese arbitration institution as an alternative to court, understanding med-arb's advantages and disadvantages with respect to arbitration-only proceedings will allow the parties and their counsel to make a more informed decision about whether to consent to conciliation.

### A. *Advantages*

Advantages of med-arb in China include amicable settlement of commercial disputes, the flexibility to tailor dispute resolution to the needs of the parties, and more efficient outcomes. These advantages are coupled with med-arb's higher likelihood of enforcement in Chinese courts than

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30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. See DETLEV F. VAGTS, WILLIAM S. DODGE & HAROLD HONGJU KOH, TRANSNATIONAL BUSINESS PROBLEMS (University Casebooks, 4th ed. 2008) (discussing the business effects of arbitration clauses).

that of mediation alone.<sup>39</sup> Furthermore, the New York Convention only recognizes the enforceability of arbitral awards and does not include conciliation statements.<sup>40</sup> The New York Convention, also known as the Recognition and Enforcement of Foreign Arbitral Awards, aids the enforcement in domestic courts of awards granted in foreign countries.<sup>41</sup> Most United Nations member states are parties to the convention.<sup>42</sup> Of course, each advantage is not without its limitations.

### 1. Amicable settlement

With med-arb, parties can receive the advantages of both an enforceable award and amicable settlement. Many practitioners and scholars have asserted that parties from Western European and North American cultures are often more adversarial than those from Asian cultures.<sup>43</sup> Because Asian cultures are assumed to value harmony to a greater degree, stemming from Confucianism, Asian cultures are assumed to be more suitable for med-arb.<sup>44</sup> However, the amicable settlement med-arb provides is not necessarily a significant advantage as it may be a generalization given the globalized nature of med-arb.<sup>45</sup> For instance, “given the increasingly globalized nature of education and employment, officers, directors, and general counsels of a company may have been educated overseas and may have worked in different countries.”<sup>46</sup> Therefore, their attitudes towards conflict and conflict resolution may accordingly reflect their backgrounds.<sup>47</sup> Professor Tai-Heng Chen of the New York Law School suggests that factual investigation into the cultural attitudes of the specific litigant and its counsel is necessary to determine if

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39. See Debaditya Datta & Aonkan Ghosh, *Mediation and Enforceability: Asia's Growing Dilemma*, 1, 4 (2011) (unpublished paper) *available at* [http://works.bepress.com/debaditya\\_datta/1](http://works.bepress.com/debaditya_datta/1) (discussing the enforcement of mediation and arbitration clauses in Asia).

40. *Id.* at 14.

41. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 1, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, 7 I.L.M. 1046 (recognizing and enforcing foreign arbitral awards).

42. See *New York Convention Countries*, NEW YORK ARBITRATION CONVENTION, <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states> (last visited Apr. 8, 2013) (listing participants to the New York Convention).

43. See Tai-Heng Chen, *Reflections on Culture in Med-Arb*, 34 N.Y. LAW SCHOOL RESEARCH PAPER SERIES, 422 (Sept. 10, 2010) (noting the effects of culture on arbitration).

44. *Id.* at 424.

45. *Id.* at 425.

46. *Id.*

47. *Id.*

med-arb will provide this advantage to the case at hand.<sup>48</sup>

## 2. Flexibility

The fact that the Chinese approach to combining conciliation with arbitration is conducted within a highly flexible framework allows arbitration to accommodate many non-legal factors to achieve effective resolution of the commercial dispute. Chinese law does not impose conciliation on the arbitral tribunal at the beginning of the arbitration proceedings. The arbitral tribunal may attempt conciliation at any time in the proceedings before an award is made. This makes it more flexible than arbitration-only proceedings and leaves the decision as to when to attempt a conciliation procedure at the discretion of the arbitral tribunal, in agreement with the parties. Whether or not the arbitral tribunal decides to attempt conciliation depends on factors such as the nature of the dispute, the areas of expertise of the arbitrators and mediators, the cost of arbitration, how entrenched the parties are, and business pressures to settle.<sup>49</sup>

## 3. Efficiency<sup>50</sup>

Med-arb “encompasses all the benefits that usually are attributed to settled, rather than decided, outcomes, such as [cost and time savings].”<sup>51</sup> Should parties fail to reach an amicable solution, they may still resolve their dispute through arbitration, also potentially with cost and time savings. Parties who choose arbitration are often dissatisfied with the length of time that commercial arbitration takes, while “in-house counsels are [also] facing tremendous pressure to economize.”<sup>52</sup> In med-arb, the arbitrator already knows the case, and the parties do not need to educate another party appointed as the mediator, which would include duplication of work and delays.<sup>53</sup>

Professor Gabrielle Kaufmann-Kohler of the University of Geneva points out that the ultimate arbitral award often is more acceptable even if

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48. *Id.* at 426.

49. *Id.*

50. See Carlos de Vera, *Arbitrating Harmony: ‘Med-Arb’ and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 COLUM. J. ASIAN L. 149, 164 (2004) (discussing the cultural influence of dispute resolution mechanisms in China).

51. Gabrielle Kaufmann-Kohler & Fan Kun, *Integrating Mediation into Arbitration: Why It Works in China*, 25 J. INT’L ARB. 4, 490 (2008).

52. Chen, *supra* note 39, at 423.

53. See Kaufmann-Kohler, *supra* note 46 (noting the efficiencies of arbitration).



no settlement is reached.<sup>54</sup> Compared to the situation where the parties commenced arbitration without first attempting mediation, in med-arb, the mediation process may bring the parties closer together through offers and counteroffers so that if an issue does proceed to arbitration, the differences between the positions are often minimal.<sup>55</sup> Previous negotiations will also have served to narrow down the issues that could lead to more predictable solutions.<sup>56</sup> Using med-arb, much of the arbitration process can be made more efficient.

#### 4. Building Trust

A powerful argument in favor of med-arb is that following a failed mediation, the mediators should continue on as the arbitrators if trust is built up between the parties and the arbitrators whom they have voluntarily appointed. “If the parties have gained such strong confidence in the mediator during the course of the mediation that they actually would prefer to have him or her arbitrate the remaining issues . . . this choice should be respected.”<sup>57</sup> Arbitrators who are effective mediators will be able to gain the trust of both parties.<sup>58</sup> The experience of LACs shows that combining methods of dispute settlement makes mediation more likely to produce a settlement than when conducted separately, which could be explained by the trust built up between the parties and the arbitrators.<sup>59</sup>

#### B. Disadvantages

Disadvantages of med-arb include concerns about the neutrality of the arbitral tribunal, the enforceability of the award in jurisdictions that are more skeptical of the legitimacy of med-arb, and the ability of arbitrators to also be effective mediators. In light of the competition among arbitration institutions for cases, especially for the BAC, which is financially independent, the neutrality and competence of arbitrators should be less and less of a concern. The greatest challenge to med-arb that remains is the unpredictability of international enforcement, but as med-arb is being

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54. *Id.* at 491.

55. *Id.* at 488.

56. *Id.* at 491.

57. *Id.* at 492.

58. See *infra* note 54 and accompanying text (explaining why good arbitrators possess mediation skills).

59. *Id.* at 491. Wang Shengchang, CIETAC’s Perspective on Arbitration and Conciliation Concerning China, in *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series No. 12, 27, 40 (Albert Jan van den Berg ed., 2005).

refined, confidence in Chinese med-arb should grow.

### 1. Neutrality

There is always a certain level of discomfort in not knowing exactly what the arbitrator's role will be,<sup>60</sup> but more practical issues are the lack of cross-examination, nondisclosure of important information during mediation, and paternalistic arbitrators. Each issue will be explored in depth.

There is a risk of breach of due process safeguards if caucusing is used in the mediation phase, because the information obtained may prejudice the arbitral tribunal later in arbitration proceedings.<sup>61</sup> For example, the mediator will often ask for each party's bottom line and this may influence the final amount awarded if the mediator then becomes the arbitrator.<sup>62</sup> Furthermore, if information were revealed to the arbitrator privately during caucus, the other party would not have had an opportunity for cross-examination. "[T]he arbitrator may have already formed . . . his or her views as to the merits of each party's position," and "[e]ven [if the] [r]ules expressly exclude[] from the arbitrator's decision making the information obtained during the conciliation, in practice the nature of a merged proceeding makes arbitrator [sic] objectivity difficult."<sup>63</sup> The parties may misuse the mediation as a way to make arguments to the arbitral tribunal to get ahead during the arbitration phase, rather than genuinely try to settle their case during the mediation phase.<sup>64</sup> Realistically, caucusing is not the only situation in which the arbitrator has to disregard information received.<sup>65</sup> There are always cases where improperly submitted documents or arguments are rejected or discarded after being reviewed by the arbitrator.<sup>66</sup> If judges are trusted to be capable of disregarding inadmissible evidence, there should be no reason to doubt arbitrators in their ability to remain impartial despite the information obtained during mediation.<sup>67</sup> Moreover, in the US, it is not uncommon for state trial judges to also

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60. See Paul E. Mason, *The Arbitrator as Mediator, and Mediator as Arbitrator*, 28 J. INT'L ARB. 6, 541, 545 (2011) (comparing and contrasting the roles of arbitrators and mediators).

61. Thirgood, *supra* note 22, at 94.

62. This information was obtained by the author through discussion with BAC staff and observing med-arb during my internship at the BAC.

63. Thirgood, *supra* note 26, at 94-95.

64. *Id.*

65. See Kaufmann-Kohler, *supra* note 46, at 491 (discussing instances where information is disregarded by the arbitrator).

66. *Id.*

67. *Id.*

mediate the cases over which they preside.<sup>68</sup> This process is called a judicial settlement and has long been used as a form of ADR.<sup>69</sup> Judicial settlement parallels med-arb, which means med-arb should not seem all that unfamiliar to US parties.<sup>70</sup>

If there is the possibility that mediation will fail and the arbitral tribunal will issue the final award, counsels might be less candid during the caucusing, which could reduce the chances of a successful mediation.<sup>71</sup> However, some argue that even in mediations, as in litigation or arbitration, counsel is expected to be an advocate for his clients. They may not fully disclose information that they believe would weaken their position if revealed. Thus, the criticism that counsel may be less candid in a med-arb than a pure mediation might not be grounded in reality.

Some argue that independence and impartiality will not be a problem provided that the arbitral tribunal acts cautiously and certain safeguards are put in place during the conciliation. While the Arbitration Law is silent on the subject of ethics and protocols for arbitrators who also act as mediators, some guidelines and requirements can be found in the Arbitration Rules.<sup>72</sup> To maintain its financial independence and to compete with other institutions, the BAC must attract a large caseload, which means it needs to uphold the reputation of neutrality and competence of its arbitrators. The role of a case manager may vary depending on the arbitration institution. At the BAC, case managers closely monitor the performance of arbitrators, who will be removed if their performance is not up to the standards articulated by the BAC.<sup>73</sup> For example, 44.7 percent of the arbitrators on the panel during the first term were not re-appointed in 1998.<sup>74</sup> By 2005, the BAC had undergone three terms of changes and a total of 286 arbitrators had not been reappointed.<sup>75</sup> It is likely that retention of arbitrators will improve as a result of the increasing trainings and

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68. See JUDICIAL SETTLEMENT CONFERENCES, [http://www.osbar.org/public/legalinfo/1220\\_JudicialConferences.htm](http://www.osbar.org/public/legalinfo/1220_JudicialConferences.htm) (last visited Apr. 8, 2013) (outlining judicial settlement conferences).

69. *Id.*

70. *Id.*

71. See Kaufmann-Kohler, *supra* note 46, at 491 (discussing the dangers of information that is revealed during mediation being potentially revealed during arbitration).

72. See Sally A. Harpole, *The Combination of Conciliation with Arbitration in the People's Republic of China*, 24 J. INT'L ARB. 623, 627 (2007) (describing some of the requirements of the Arbitration Rules).

73. See Fuyong Chen, *Striving for Independence, Competence, and Fairness: A case Study of the Beijing Arbitration Commission*, 18 AM. REV. INT'L ARB. 313, 333 (2007) (discussing the arbitration process of the BAC).

74. *Id.* at 332.

75. *Id.* at 333.

examinations required to become a BAC arbitrator.<sup>76</sup>

These safeguards should be weighed against their chilling effects. In Hong Kong, if the case does not settle in mediation, the arbitrator has a duty to disclose as much information as possible obtained during the course of an *ex parte* discussion that is material to the arbitral proceedings, for the other party to consider and comment upon.<sup>77</sup> This measure is likely to prevent parties from revealing information to the arbitrator if they would not like that information to be revealed to the other party.

There does exist a key safeguard in med-arb: the parties are free to decide whether or not to use conciliation at all and, after conciliation has begun, the parties may also elect to discontinue using it.<sup>78</sup> The available statistics on the use of conciliation combined with arbitration in China suggest that parties frequently decide to use med-arb.<sup>79</sup> The parties are likely drawn to the benefits inherent in combining a negotiated settlement over which the parties retain control with the process of arbitration.

Nevertheless, there are individual differences between arbitrators when conducting conciliation and these styles have changed over time. As one commentator notes, “[b]efore the late 1980s, it was not uncommon for arbitral tribunals to adopt an evaluative approach, whereby [the arbitrator while serving as the mediator] proactively informed the parties regarding their preliminary views on the case in an attempt to persuade them to consider settling their claims.”<sup>80</sup> Since their establishment following the promulgation of the Arbitration Law in 1994, arbitration institutions such as the BAC and CIETAC have emphasized the role the arbitrator plays as a facilitator during conciliation. In line with this more modern emphasis, arbitrators who are engaged in mediation “are encouraged to exercise considerable caution and care in discussing their views” of the case in order to “avoid creating the appearance of bias.”<sup>81</sup> Still, arbitrators are given a good deal of leeway in how they conduct the conciliation. To enhance the parties’ confidence in the arbitral tribunal, the Arbitration Law and Arbitration Rules require that the tribunal diligently oversee the progress of the conciliation and that the tribunal resume the arbitration promptly if the conciliation does not result in a timely settlement.<sup>82</sup>

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76. *Id.* at 334 (describing the training that must be completed by BAC arbitrators).

77. Edna Sussman, *Med-Arb: an Argument for Favoring Ex Parte Communications in the Mediation Phase*, 7 WORLD ARBITRATION AND MEDIATION REVIEW, no. 2, 2013, at 8.

78. See Russell Thirgood, *A Critique of Foreign Arbitration in China*, 17 J. INT’L ARB. 89, 93 (2000) (noting the optional nature of mediation in China).

79. See Chen at 314 (showing the rapid increase of local arbitration commissions).

80. Sally A. Harpole, *The Combination of Conciliation with Arbitration in the People’s Republic of China*, 24 J. INT’L ARB. 623, 626 (2007).

81. *Id.* at 626-27.

82. *Id.*

There are also fundamental differences between Chinese and American conceptions of mediation. For example, proposed settlements by judges in China can often be more coercive. Judges will achieve settlement by threatening an unfavorable ruling should the mediation fail. This might be appropriate for an emerging market like China, where arbitrators who have expertise in the specific type of commerce can be more paternalistic to encourage economic efficiency, but most non-Chinese parties will perceive the judge's threats as a type of undesirable impartiality.

Because of the differences between mediation and arbitration in China and elsewhere, the best practices of Western countries have inspired a "re-examination of the values of mediation in China."<sup>83</sup> For example, "[t]o address the concerns of impartiality of the mediator-turned-arbitrator, the BAC now allows the parties to request the replacement of an arbitrator on the ground that the results of the award may be affected by his involvement in the mediation proceedings."<sup>84</sup> This rule is similar to the IBA rule requiring "the arbitrator to resign if he or she considers him or herself to lack objectivity as a result of a failed mediation attempt."<sup>85</sup> Another notable development is the BAC's promulgation of separate mediation rules, which took effect on April 1, 2008.<sup>86</sup> These new arbitration and mediation rules are designed to make med-arb more appealing to a Western audience.

### III. THE ARBITRATOR AND MEDIATOR

It is rare to find individuals who are capable of serving as both a mediator and an arbitrator. Any person wishing to serve as both a mediator and an arbitrator will not only need to possess the traits essential to both roles, but he or she will also need to know how and when to switch between the two roles. The arbitrator serves as a type of private judge and must therefore possess a judicial temperament. This person must have the ability to adjudicate by analyzing opposing arguments concerning the facts and law.<sup>87</sup> "[H]e or she needs to have traits and skills such as strict neutrality and impartiality, knowledge of the law, ability to evaluate

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83. Gabrielle Kaufmann-Kohler and Fan Kun, *Integrating Mediation into Arbitration: Why It Works in China*, 25 J. INT'L ARB. 479, 492 (2008).

84. *Id.* (emphasis omitted).

85. *Id.*

86. *Id.*

87. See Paul E. Mason, *The Arbitrator as Mediator, and Mediator as Arbitrator*, 28 J. INT'L ARB. 541, 542 (2011) (comparing and contrasting the roles of arbitrators and mediators).

documents and witnesses . . . and decision-making skills.”<sup>88</sup> As Professor Paul Mason notes, an effective mediator needs to gain the trust of both parties and must “possess a very different set of traits and skills.”<sup>89</sup> These skills include “interpersonal awareness . . . understanding the psychology of negotiations, finding hidden issues which may underlie the parties’ conflicts . . . and creativ[ely] helping parties fashion a unique solution for themselves.”<sup>90</sup>

The BAC, for example, has been able to holistically monitor arbitrators and ensure that they are qualified as both arbitrators and mediators. The BAC’s policy in selecting mediators considers the academic qualifications and previous job titles of arbitrators to be important, however the BAC is also aware that these factors may not “truly reflect[] the actual . . . abilities of an arbitrator in handling cases.”<sup>91</sup> The revision of the BAC’s “Standards for Selection, Appointment and Re-Appointment of Arbitrators” added the requirement that arbitrators must be capable of mediation work in addition to their other responsibilities.<sup>92</sup> While the BAC is stringent in selecting high caliber talent, it also values the importance of training and examination of current arbitrators. Those who do not attend training courses and pass required exams on the arbitration rules, ethical standards, and arbitration practices will not be appointed by the Chairman.<sup>93</sup> In Fuyong Chen’s study of the BAC, he notes that “if a previously appointed arbitrator . . . has not handled cases for a long period of time, the BAC will not re-appoint him [or her].”<sup>94</sup> While some mediation skills can only come from natural personality traits, many other skills can be taught through training.

## VI. ENFORCEABILITY

Parties should consider whether an award or settlement at the end of med-arb would be enforceable in the jurisdiction in which assets are located.<sup>95</sup> Professor Tai-Heng Cheng has pointed out that “the enforceability of med-arb outcomes will remain a key issue . . . because

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88. *Id.* at 543.

89. *Id.*

90. *Id.*

91. Fuyong Chen, *Striving for Independence, Competence, and Fairness: A case Study of the Beijing Arbitration Commission*, 18 AM. REV. INT’L ARB. 313, 331 (2007).

92. *Id.*

93. *Id.* at 333.

94. *Id.* at 334.

95. See Tai-Heng Cheng, *Reflections on Culture in Med-Arb* (New York Law School, Research Paper Series No. 34, Sept. 10, 2010), 427 (discussing the influence of culture on mediation and arbitration).

structural adjustments to fully accommodate med-arb within the international legal framework for alternative dispute resolution is unlikely to occur in the near future.”<sup>96</sup> Cheng further argues that “[a]s a policy matter, to the extent that party autonomy is paramount, party preferences for med-arb should be accorded legal effect by international and national legal systems.”<sup>97</sup> However, the New York Convention was drafted with participation from a small number of states, most of which do not favor med-arb.<sup>98</sup> “The difficulties of obtaining consensus on an amendment that would more fully accommodate med-arb are demonstrated by the pace through which changes to the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration snake through the United Nations year after year.”<sup>99</sup> Nevertheless, as med-arb becomes more refined and effective in China, other countries may become more confident in the benefits of med-arb and it may become easier to enforce med-arb decisions.

In December of 2011, the High Court of Hong Kong demonstrated its growing confidence in med-arb when it affirmed an award by the Xian Arbitration Commission despite alleged misconduct during med-arb.<sup>100</sup> This was a notable event because Hong Kong is a different jurisdiction with its own arbitration laws and it has been skeptical of med-arb in the past.<sup>101</sup> As one commentator noted, “[t]his decision confirms Hong Kong’s pro-enforcement approach to arbitral awards, and reminds parties . . . that, whe[n] they believe some irregularity has occurred in the arbitral or med-arb process, they must raise the issue promptly.”<sup>102</sup> This commentator goes on to note that, if a party does not raise these issues in a timely manner, “the party risks being found to have waived its right to object to the award or to seek to have it set aside.”<sup>103</sup> This is comforting to parties who seek the enforcement of a PRC award in Hong Kong based on arbitration or mediation that is administered in a way that differs from Hong Kong’s

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96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. Herbert Smith Freehills, ADR Notes, *Hong Kong High Court consider the med-arb procedure* (June 8, 2008), available at <http://hsf-adrnotes.com/2011/06/08/hong-kong-courts-consider-the-mediation-arbitration-procedure/> (noting the high court’s decision to affirm the award, while analyzing the lower courts initial decision not to enforce the award).

101. *Id.* (summarizing the Hong Kong lower court’s reasoning in its initial ruling that the Chinese med-arb award should not be enforced because the procedures used during the med-arb made enforcement of the award contrary to public policy).

102. Mun Yeow and Morgana Brady, *Hong Kong Enforces PRC ‘Med-Arb’ award*, ALLENS ARTHUR ROBINSON, Feb. 9, 2012, available at <http://www.allens.com.au/pubs/asia/foasia10jan12.htm>.

103. *Id.*

customary practices, i.e., through med-arb.<sup>104</sup> It is reasonable to think that other countries may follow suit if their confidence in med-arb grows.

### CONCLUSION

The United States and other foreign parties should understand and even appreciate the option of med-arb when the forum for a commercial dispute is a Chinese arbitration institution. As Chinese arbitration institutions like the BAC refine their practice of med-arb, moving towards greater independence, impartiality, and competence, med-arb should become even more attractive. Some even argue that “as Western legal systems come under increasing attack for being out of touch . . . and for being stifled by procedural baggage it is necessary to explore alternative options.”<sup>105</sup> With the growth of commercial arbitration in China, arbitrators abroad may have a way to learn about the advantages of med-arb as an alternative to cumbersome Western legal procedures.

The advantages of med-arb in China include amicable settlement of commercial disputes, the ability to better tailor dispute resolution to the needs of the parties, and more efficient outcomes. In addition to these advantages, med-arb has a higher likelihood of enforcement in Chinese courts than mediation alone. And the New York Convention only recognizes the enforceability of arbitral awards, not mediation agreements. The disadvantages of med-arb include potentially compromising the neutrality of the arbitral tribunal, the possibility of a lack of ability to enforce the award in certain jurisdictions, and the difficulty of finding candidates who can be effective as both arbitrators and mediators.

The competition among commercial arbitration institutions for cases in recent years could make the impartiality and competence of arbitrators less of a problem. The BAC has led the way as a financially independent and top choice LAC, raising standards and performance continuously. The greatest challenge to med-arb is the unpredictability of international enforcement, but, as med-arb improves, confidence in Chinese med-arb will grow internationally. Other countries like the United States may also think more about incorporating successful elements of med-arb into their own laws.<sup>106</sup> Of course, greater efforts need to be made to implement the procedural safeguards necessary to address the disadvantages of med-arb

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104. *Id.*

105. Russell Thirgood, *A Critique of Foreign Arbitration in China*, 17 J. INT’L ARB. 89, 89 (2000).

106. See Gabrielle Kaufmann-Kohler and Fan Kun, *Integrating Mediation into Arbitration: Why It Works in China*, 25 J. INT’L ARB. 479, 492 (2008) (describing a trend toward combining elements of multiple arbitration systems from different countries).



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outlined in this paper.<sup>107</sup> The exchange of ideas and procedures relating to arbitration between China and other countries could be used to improve arbitration in the United States and worldwide.<sup>108</sup>

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107. *Id.*

108. *Id.*